Citation: ***L. C. v. Minister of Employment and Social Development,*** **2015 SSTAD 1478**

Date: December 29, 2015

File number: AD-15-1332

APPEAL DIVISION

Between:

L. C.

Applicant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Applicant contended that she was disabled by bilateral shoulder injuries suffered at work when she applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after reconsideration. The Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a hearing by telephone and videoconference and on September 11, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal. She argued that the hearing should have been held in person, that the General Division should have considered that the WSIB had increased their award to her as a result of her injuries, and she disagreed with the decision and the weight that the General Division gave to some of the evidence before it.

[3] The Respondent did not file any submissions regarding the request for leave to appeal.

ANALYSIS

[4] A leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits; however an arguable ground upon which the proposed appeal might succeed is needed in order for leave to be granted: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC). Further, the Federal Court of Appeal has found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[5] The *Department of Employment and Social Development Act* governs the operation of the Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered (this is set out in the Appendix to this decision). Therefore, I must decide if the Applicant has

put forward a ground of appeal that falls within section 58 of the Act and that may have a reasonable chance of success on appeal.

[6] First, the Applicant contended that the General Division hearing should have been held in person so that the Member could see her and assess her case. The *Social Security Tribunal Regulations* provide (section 21) that hearings may be held in writing, by teleconference, by videoconference or other means of telecommunication, or in person. In addition, section 28 of the Regulations provides that after all documents are filed with the General Division (or the time to do so has expired) the Income Security Section must make a decision on the basis of the documents and submissions filed, or if it determines that a further hearing is required, send a Notice of Hearing to the parties (see Appendix). On the plain reading of these provisions it is clear that there is no entitlement to an in person hearing for any claimant. This argument is not a ground of appeal that has a reasonable chance of success on appeal.

[7] Further, in *Singh v. Minister of Employment and Immigration* ([1986] 1 SCR 177) the Supreme Court of Canada concluded that in the sphere of quasi-judicial decision making there is a duty of fairness owed to parties. This means that parties must know the case against them, and have an opportunity to meet that case and present their own case. It does not mean, however, that in each case parties are entitled to an in person hearing.

[8] The Supreme Court of Canada again dealt with the issue of procedural fairness again in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. In that case, the Court stated clearly that a decision that affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness is, however, variable and its content is to be decided in the specific context of each case. This decision then lists a number of factors that may be considered to determine what the duty of fairness requires in a particular case. They include the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute in question, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[9] In applying these factors to this case, I find the following: first, it is clear that a decision of the General Division on the merits of an appeal before it affects privileges of the claimant. A decision on the form that a hearing takes to determine these privileges, by extension, also affects them.

[10] Next, the nature of the decision in question in this case is procedural. The form of the hearing does not change the fact that an Applicant has the opportunity to present her case and answer the case of the Respondent.

[11] I accept that the issues in this matter are important to the Applicant.

[12] I place great weight on the nature of the statutory scheme that governs the Social Security Tribunal. This Tribunal was designed to provide for the most expeditious and cost effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gave the Tribunal the discretion to determine how hearings are to be conducted, whether in person, by videoconference or in writing, etc. The discretion to decide how each case will be heard should not be unduly fettered.

[13] Many court cases have discussed the concept of legitimate expectations. It is clear from these decisions that this concept refers to procedural expectations, not substantive ones. In other words, a party to an application before the Social Security Tribunal can expect certain procedural guarantees, but not a specific outcome to his or her case (see *Baker*, above). Similarly, in this case, I find that the Applicant's legitimate expectations did not extend to include a right to an in person hearing. This is not contemplated in the Act that governs the Tribunal, nor is it contained in the Regulations.

[14] Finally, I must consider the choices of procedure made by the General Division. The Regulations provide that a Tribunal Member is to determine the form a hearing will take. The Regulations do not provide any direction on how that is to be decided. It is a discretionary decision. The decision of the Member in each case is therefore to be given deference. In this case, the Member initially determined that the hearing would proceed by teleconference. When it became apparent that this would not provide the Applicant with a proper hearing due to technological problems, the hearing was rescheduled and held by videoconference. The reasons

for the decision regarding the form of hearing were set out in the Notice of Hearing that was sent to the parties. There is no indication that the Applicant objected to proceeding by videoconference at that time.

[15] Finally on this issue, the Applicant did not allege that the General Division improperly exercised its discretion when it decided how to proceed. There was nothing before me that indicated that the General Division failed to consider appropriate factors or considered inappropriate factors when it decided what form the hearing would take.

[16] For all of these reasons I am not persuaded that the General Division erred, and this ground of appeal does not have a reasonable chance of success on appeal.

[17] The Applicant also wrote in the leave to appeal application that WSIB held a hearing and increased the award payable to her as a result of her shoulder injuries. She argued that this should be considered by this Tribunal. The General Division decision summarized the evidence before it regarding the WSIB and considered this in making its decision. Certainly this Tribunal is not bound by any findings of fact or any conclusion reached in that proceeding. I am not satisfied that the General Division made any error in its consideration of this. Leave to appeal is not granted on the basis of this argument.

[18] The Applicant also argued that she lives in a small community, has limited job options given her age and lack of transferrable skills. She suggested that this should have been considered. The General Division did consider the Applicant's personal characteristics including her age, education, and work and life experience. It made no error in so doing. The courts have consistently stated that socio-economic factors such as job availability are not relevant considerations when deciding a *Canada Pension Plan* disability claim. The General Division did not consider this as a factor in making the decision, but did not err by not doing so. This is not a ground of appeal that has a reasonable chance of success on appeal.

[19] The Applicant also disagreed with the General Division conclusion regarding her not pursuing mental health diagnosis or treatment. She contended that this was not part of her WSIB benefit entitlement. The General Division correctly considered all of the Applicant's medical conditions, both physical and mental. In law it was required to also consider whether

the Applicant's refusal to attend for treatment was reasonable. It did so, and concluded that her refusal was not reasonable. The evidentiary basis for this conclusion was clearly set out. The fact that the Applicant was not entitled to mental health benefits under her WSIB award was not a relevant consideration for the General Division. It made no error in not considering this. This ground of appeal does not have a reasonable chance of success on appeal.

[20] Finally, the Applicant argued that the General Division did not give sufficient weight to "the whole person". The decision considered the Applicant's personal characteristics, each of her medical conditions and the impact that they had individually and cumulatively on her ability to work. It is not for the Appeal Division, when deciding whether to grant leave to appeal, to reweigh the evidence to perhaps reach a different conclusion (see *Simpson v. Canada (Attorney General)*, 2012 FCA 82). This ground of appeal also does not have a reasonable chance of success on appeal.

CONCLUSION

[21] The Application is refused because the Applicant did not present a ground of appeal that falls within section 58 of the Act and that may have a reasonable chance of success on appeal.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

Social Security Tribunal Regulations

21. If a notice of hearing is sent by the Tribunal under these Regulations, the Tribunal may hold the hearing by way of

(a) written questions and answers;

(b) teleconference, videoconference or other means of telecommunication; or

(c) the personal appearance of the parties.

28. After every party has filed a notice that they have no documents or submissions to file — or at the end of the applicable period set out in section 27, whichever comes first — the Income Security Section must without delay

(a)) make a decision on the basis of the documents and submissions filed; or

(b) if it determines that further hearing is required, send a notice of hearing to the parties